BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RENA CRAFT	)	
Claimant	)	
VS.	)	
	)	Docket No. 247,188
RUSSELL STOVER CANDIES	)	
Respondent	)	
AND	)	
	)	
HARTFORD INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed Administrative Law Judge Brad E. Avery's May 15, 2000, Award. The Appeals Board heard oral argument on September 20, 2000.

APPEARANCES

Claimant appeared by her attorney, Timothy M. Alvarez of Kansas City, Missouri. Respondent and its insurance carrier appeared by their attorney, Brenden W. Webb of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge denied claimant's request for work disability and limited claimant's award to a 20 percent permanent partial general disability based on permanent functional impairment. The Administrative Law Judge found that claimant failed to make a good faith effort to find appropriate post-injury employment. The Administrative Law Judge then determined claimant retained the ability to earn 90 percent or more of her

pre-injury average weekly wage.[1] Therefore, the Administrative Law Judge denied claimant's request for work disability and limited her award to a 20 percent permanent partial general disability award based on functional impairment.[2]

On appeal, claimant contends, based on her medical restrictions, her current vocational profile, and the geographic area she is located, her current part-time employment of working 12 hours per week is appropriate employment. But if the Appeals Board determines the claimant has the ability to work full time, claimant contends the record contains evidence through the testimony of vocational experts that proves claimant has the ability to earn a post-injury wage between $199.50 and $210.00 per week resulting in a post-injury wage loss of between 31 and 34 percent. Claimant argues her wage loss should be averaged with a 100 percent work task loss resulting in claimant's entitlement to a work disability of 65.5 to 67 percent.

Respondent agrees with the Administrative Law Judge that claimant's permanent partial general disability award is limited to her permanent functional impairment. Respondent contends the reason claimant is not entitled to a work disability and thus limited to an award based on functional impairment is because claimant was terminated for violation of respondent's attendance policy. Additionally, respondent argues that the Administrative Law Judge should have awarded claimant only a 12 percent permanent partial general disability based on the more credible permanent functional impairment opinion of claimant's treating physician, hand surgeon Regina M. Nouhan, M.D. The respondent argues the Administrative Law Judge erred when equal weight was given to the 28 percent permanent functional impairment rating expressed by P. Brent Koprivica, M.D., who at claimant's attorney's request examined and evaluated claimant on one occasion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and the parties' arguments, the Appeals Board makes the following findings and conclusions:

The Appeals Board finds the Administrative Law Judge's Award should be affirmed. But the Appeals Board finds the reason claimant is not entitled to a work disability is because claimant's wage loss resulted from respondent terminating claimant for violation of respondent's attendance policy and not from the work injuries.

Claimant started working for respondent on January 9, 1998, performing job duties requiring repetitive use of her upper extremities. She first started having symptoms in her

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[1] *See* Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, Syl. ¶8, 944 P.2d 179 (1997).

[2] *See* K.S.A. 1997 Supp. 44-510e(a).

left upper extremity in February of 1998 and then in her right upper extremity about a month later. Respondent provided medical treatment first with a local physician, Brian D. Wolfe, M.D. Claimant was then referred to hand surgeon Regina M. Nouhan, M.D., located in Kansas City, Missouri.

Dr. Nouhan first saw claimant on June 1, 1998, and treated claimant until she released claimant on January 28, 1999. Dr. Nouhan diagnosed claimant with cumulative trauma disorder with some generalized inflammation. The doctor first treated claimant conservatively with steroid injections. She eventually performed carpal tunnel releases, first on the left on August 24, 1998, and then on the right on November 6, 1998.

Because of claimant's bilateral upper extremity problems, on May 6, 1998, she was placed on light duty with the restrictions of no repetitive use of hands. Claimant testified, however, that some of the light duty jobs respondent had her perform did require her to repetitively use her hands. As she continued to work on light duty, claimant testified her hands remained symptomatic.

Finally, claimant testified she returned to see her treating physician, Dr. Nouhan on July 16, 1998. At that visit, Dr. Nouhan recommended carpal tunnel release surgery. Because claimant wanted to see if her upper extremities would quit hurting, she asked the doctor to take her off work for two days. Dr. Nouhan gave her an off-work slip for July 17 and July 18, 1998, which was Thursday and Friday of that week. Claimant was to return to work on Monday, July 20, 1998.

Claimant took the off-work slip to respondent on July 16, 1998. Respondent inquired as to the reason claimant needed to be off work, and claimant told respondent she wanted to avoid using her hands for two days. Respondent then told claimant to come to work because respondent would accommodate her restriction against using her hands. Respondent also told claimant the company would contact Dr. Nouhan and request the doctor to change the off-work restrictions from no work to no hand use.

But claimant decided she was not going to return to work until after she took those two days off work. On July 17, 1998, claimant called and notified respondent that she had overslept and was not coming to work. The respondent then terminated claimant for violation of its attendance policy.

Respondent's attendance policy is categorized as a "No Fault" policy. Generally, the policy provides for an employee's termination after the employee has seven occurrences within a six month period. An occurrence is an absence from work from one to three contiunous days. Before respondent terminated claimant on July 17, 1998, claimant had accumulated six occurrences.

Claimant testified that she knew if she was absent one more day she would be terminated. Claimant testified all but two of her occurrences were related to her work-

related upper extremity problems. But respondent's human relations manager, Cinda Croley, testified claimant had not informed the respondent that any of the occurrences were related to her upper extremity problems. Ms. Croley was also puzzled that claimant needed two days off work to find out whether her hands would quit hurting because she had been off work for the first 10 days in July of 1998 because of a plant shut down.

Ms. Croley further testified that respondent had a strict policy to return injured workers to accommodated jobs within their work restrictions. Claimant had been working on accommodated jobs since May 6, 1998, and would have continued to work on accommodated jobs if she had not been terminated.

The Appeals Board concludes this case is controlled by the Court of Appeals decision in Ramirez v. Excel Corp., 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. ____ (1999). The claimant in Ramirez had returned to work with permanent restrictions and assigned light duty work. The respondent then terminated claimant for failing to disclose in his employment application that he had a prior workers compensation claim involving his back. The Administrative Law Judge denied claimant a work disability and limited him to a permanent partial general disability award based on the stipulated 24 percent permanent functional impairment rating. The Administrative Law Judge found claimant's wage loss resulted from his termination and not from the work injuries.

On appeal to the Appeals Board, claimant was granted a work disability. The Appeals Board found, since claimant's misconduct predated his work-related injury and his prior workers compensation injury did not have a causal relationship to his current injury, claimant was entitled to a work disability.

The Court of Appeals reversed the Appeals Board and remanded the case with directions to reinstate the Administrative Law Judge's award limiting claimant to the stipulated permanent functional impairment. The Court of Appeals held Ramirez was controlled by its decisions in Perez v. IBP, Inc., 16 Kan. App. 2d 277, 826 P.2d 520 (1991) and Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). 26 Kan. App. 2d at 143.

In Perez, the claimant was denied a work disability after he returned to work and was then terminated by respondent for excessive absenteeism. In Foulk, claimant was denied a work disability for rejecting and never attempting to perform a job offered by the employer within her restrictions at the same rate of pay.

The Appeals Board concludes claimant's wage loss resulted from her termination for violation of respondent's attendance policy and not from the work injuries. Respondent had a strict policy of placing an injured worker in accommodated jobs within the injured worker's temporary or permanent restrictions. After claimant notified respondent the reason the doctor was taking her off work was to avoid using her hands for two days, the respondent notified claimant it would accommodate that restriction. But instead of coming

to work the next day as instructed, claimant notified respondent she overslept and would not be at work. Respondent then terminated claimant because this was the seventh occurrence in a six month period and was a violation of respondent's attendance policy.

Furthermore, after the review of Dr. Nouhan's and Dr. Koprivica's testimony, the Appeals Board finds the doctor's ratings should be given equal weight resulting in a 20 percent permanent partial general disability award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Brad E. Avery's May 15, 2000, Award should be, and is hereby, affirmed, except, as set forth above in this Order, the reason claimant is not entitled to a work disability is because respondent terminated claimant for violation of respondent's attendance policy and not for the work injuries.

IT IS SO ORDERED.

Dated this ____ day of October 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy M. Alvarez, Kansas City, MO
Brenden W. Webb, Overland Park, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director